92-1139

Supreme Court, U.S.
FILED
NOV 20 1992
OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RAY CARLISLE, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE NINTH CIRCUIT

Barry L. Morris
Attorney at Law
1401 Lakeside Drive, Suite 700
Oakland, California 94612
(510) 839-1288

Attorney for Petitioner
RAY CARLISLE

32 pp

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RAY CARLISLE, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE NINTH CIRCUIT

Barry L. Morris
Attorney at Law
1401 Lakeside Drive, Suite 700
Oakland, California 94612
(510) 839-1288

Attorney for Petitioner
RAY CARLISLE

Question Presented

Was Petitioner was Denied Due Process of Law and Equal Protection of the Laws When the Trial Court Failed to Instruct the Jury that A Violation of 31 U.S.C. §5324, "Willfully" Structuring a Monetary Transaction, Required Proof Beyond a Reasonable Doubt that Petitioner Voluntarily and Intentionally Violated a Known Legal Duty per this Court's Decision in *Cheek v. United States* (1991) __U.S.__, 111 S.Ct. 604?

Table of Contents

QUESTION PRESENTED	ii
LIST OF PARTIES	iii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOKED	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	3

ARGUMENT 11

I.

Petitioner was Denied Due Process of Law and Equal Protection of the Law When the Trial Court Failed to Instruct the Jury that A Violation of 31 U.S.C. §5324, "Willfully" Structuring a Monetary Transaction Required Proof Beyond a Reasonable Doubt that Petitioner Voluntarily and Intentionally Violated a Known Legal Duty per this Court's Decision in *Cheek v. United States* (1991) __U.S.__, 111 S.Ct. 604 11

A. Statement of Facts 11

B. This Court's Decision in *Cheek v. United States* 1991) __U.S.__, 111 S.Ct. 604 Mandates that a Jury Must be Instructed that "Willfully" as Used in 31 U.S.C. §5322 Means a "voluntary, intentional violation of a known legal duty." 13

C. Conclusion 25

List of Parties (Rule 28.1)

The parties to the proceedings below were petitioner RAY CARLISLE and respondent UNITED STATES OF AMERICA.

Table of Authorities

American Surety Co. v. Sullivan
(2nd Cir. 1925) 7 F.2d 605 — 13

Cheek v. United States
(1991) __U.S.__, 111 S.Ct. 604 — 13, 16, 24

Firestone v. Howerton
(9th Cir. 1982) 671 F.2d 317 — 19

Ginsberg & Sons v. Popkin
285 U.S. 204 — 21

Pacific Gas and Electric v. S. E. C.
(9th Cir. 1942) 127 F.2d 378 — 21

Platt v. Union Pacific R.R.
(1878) 99 U.S. 48 — 21

S&M Investment v. T. R. P. A.
(9th Cir. 1990) 911 F.2d 324 — 19

United States v. Bank of New England
(1st Cir. 1987) 821 F.2d 844 — 15

United States v. Bishop
(1973) 412 U. S. 346 — 13, 18

United States v. Chen
(9th Cir. 1979) 605 F.2d 433 — 15

United States v. Eisenstein
(11th Cir. 1984) 731 F.2d 1540 — 15

United States v. Granda
(5th Cir. 1978) 565 F.2d 922 — 15

United States v. Hoyland
(9th Cir. 1990) 914 F.2d 1125 — 15

United States v. Murdock

(1933) 290 U.S. 389 13

United States v. Pomonio
(1976) 429 U.S. 10 13

United States v. Salinas-Garza
(5th Cir. 1986) 803 F.2d 834 15

United States v. $122,043.00 in U.S. Currency
(9th Cir. 1986) 792 F.2d 1470 15

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RAY CARLISLE, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE NINTH CIRCUIT

Petitioner RAY CARLISLE respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeal for the Ninth Circuit, rendered on June 22, 1992, and the order of the Court of Appeal for the Ninth Circuit, rendered on August 27, 1992, denying Petitioner's Petition for Rehearing.

Opinions Below

The opinion of the Court of Appeal for the Ninth Circuit in the above entitled case was an unpublished opinion rendered on June 22, 1992 and is reproduced in the Appendix hereto at A-1 through A-7. Petitioner's Petition for Rehearing was denied by the Court of Appeal for the Ninth Circuit on August 27, 1992.

Jurisdiction

This case comes before this Court following the judgment of the Court of Appeal for the Ninth Circuit June 22, 1992, affirming petitioner's conviction structuring a monetary transaction (31 U.S.C. §5322, 31 U.S.C. §5324(1), 31 U.S.C. §5324 (3)). The Court of Appeal for the Ninth Circuit denied a timely Petition for Rehearing on August 27, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutes Invoked

31 U.S.C. §5313, 31 U.S.C. §5322, 31 U.S.C. §5324(1), 31 U.S.C. §5324 (3)

Statement of the Case

On April 11, 1990, the Grand Jury for the Northern District of California returned an indictment, charging petitioner Ray Carlisle and two others with currency regulation violations, to wit: Count One, conspiracy to violate 31 U.S.C. §5313 (a), 31 U.S.C. §5324(1) and 31 U.S.C. §5324(3) (Reporting and Structuring Transactions), and Count Two, a violation of 31 U.S.C. §5324(3) (Structuring Currency Transactions). On August 17, 1990 a jury returned a guilty verdict on both counts.

Petitioner was sentenced on November 9, 1991 as follows: Count One: One year in the custody of the Attorney General to be served at a halfway house; Count Two: Sentence suspended with petitioner placed on five years probation. Petitioner was also ordered to pay a fine in the amount of $3,500.00.

A Notice of Appeal was filed November 16, 1991. On June 22, 1992, the Court of Appeal for the Ninth Circuit affirmed petitioner's conviction. Petitioner's Petition for Rehearing was denied on August 27, 1992.

Statement of Facts

Petitioner is a real estate appraiser. He was prosecuted for allegedly participating in a scheme to

convert currency into a series of cashiers checks for the purpose of providing down payments on the purchase of two houses by the codefendants in this case. The checks were purchased by the government's principal witness, Curtis Randolph, a housing inspector employed by the City of Oakland, who was originally charged along with petitioner. He subsequently agreed to testify for the government and was allowed to plead guilty to a misdemeanor charge in return for testimony with the promise of no jail time.

Mr. Randolph testified that over the last eight to ten years, he occasionally packaged real estate loans for people by preparing the forms and presenting them to various lenders. According to Mr. Randolph, he himself never loaned money, "from [his] own person cash." (R.T. 240-241, 308) He told the jury that he had gone through bankruptcy proceedings in 1986 involving over $100,000.00 of debts. Mr. Randolph told the jury that some of the funds for the loans he had arranged came from financial institutions and some of it come from private sources. Typically, he would charge a fee for this service. (R.T. 310) He conceded that he had engaged in loan packaging for the years 1986-1987. (R.T. 311)

Mr. Randolph told the jury that he had known petitioner for almost twenty years and had been involved with approximately a half dozen other real estate transactions with him. According to Mr. Randolph, he became involved in the transaction in the following manner. Mr. Randolph testified that, a few days before he bought the checks, he was contacted by petitioner who asked him if he wanted to make some money. He went to petitioner's house where he was told by petitioner that there were two individuals buying houses who needed cashiers checks purchased and would he do it? Although he testified that he was not told how much money was involved, he agreed to do it, within a minute or two, when informed that there was three thousand dollars in it for him.[1] (R.T. 245, 381)

According to Mr. Randolph, petitioner told him that he was needed to purchase the checks because of the

---

[1] Mr. Randolph admitted that he told Agent Fletcher on July 9, 1987 that he had met with Mr. Jackson and Mr. Powers at appellant's house to discuss the purchase of the cashier's checks, but that appellant was not in the room. "I couldn't just of out and buy some checks for somebody that obviously I just didn't know, had never even met. So, basically, I had to more or less pretend that I knew them." (R.T. 342, 455)

reporting requirement[2] and to carry second deeds of trust to make it look like the properties were fully encumbered so that no one would be interested in seizing the property.[3] (R.T. 246) According to Mr. Randolph, petitioner told him that the purchasers of the houses were gamblers and the money was proceeds from gambling. (R.T. 247) "The only thing I was interested in at that point was the three thousand dollars,"[4] said Mr. Randolph. (R.T. 248)

A day or two later, Mr. Randolph received a call from petitioner who told him that it was all set up[5] and they agreed to meet in at the Rockridge Shopping Center in Oakland. On March 17, 1987, Mr. Randolph picked up petitioner at his home and took him to the shopping

---

[2] Mr. Randolph admitted that he told Agent Fletcher that he purchased the checks because Mr. Jackson and Mr. Powers did not want to take the time to do so. (R.T. 410)

[3] Mr. Randolph admitted that in his July 9, 1987 statement he told Agent Fletcher that he and appellant had never discussed the deeds of trust. (R.T. 341)

[4] Mr. Randolph admitted that, on two occasions, he told Agent Fletcher of the Internal Revenue Service that he had received no fee for purchasing the checks because he was going to get money for doing work on the houses purchased by Mr. Jackson and Mr. Powers. (R.T. 317, 340)

[5] Mr. Randolph admitted that he told Agent Fletcher that appellant did not give him any instructions. (R.T. 328)

center in his truck[6]. (R.T. 249) Mr. Powers and Mr. Jackson, the purchasers of the houses in question, arrived in a white Blazer. Mr. Randolph testified that this was the first time he had met Mr. Powers and Mr. Jackson[7]. (R.T. 413) According to Mr. Randolph, Mr. Powers and Mr. Jackson had a large amount of cash in a shoe box. They all went to 20th Street and Broadway, petitioner in his car and Mr. Powers and Mr. Jackson in their car.[8] (R.T. 251)

When they got there, Mr. Jackson gave him a bundle of money, $9,000.00, which he removed from a shoe box,[9] to purchase a cashier's check made payable to Founder's Title Company. Mr. Randolph purchased the check, gave it to Mr. Powers, who gave him another bundle of cash and followed the same procedure at three

---

[6] Mr. Randolph admitted that he told Agent Fletcher that he had met appellant at the shopping center. (R.T. 352)

[7] Mr. Randolph admitted that he told Agent Fletcher in his July 9, 1987 statement, that he had met Mr. Powers and Mr. Randolph on several occasions at appellant's house, prior to March 17, 1987. (R.T. 393)

[8] Mr. Randolph admitted that he told Agent Fletcher that they had all gone in one car. (R.T. 354)

[9] Mr. Randolph admitted that he didn't tell Agent Fletcher about the shoebox. (R.T. 355)

additional banks.[10] After the fourth transaction was complete, it was after 4:00 p.m. and Mr. Randolph and Mr. Powers agreed to meet the next day to purchase two more checks. (R.T. 253-257)

After the last check was purchased that day, Mr. Randolph received $3,000.00 in cash from Mr. Powers. According to Mr. Randolph, he turned over $1,000.00 of that amount to petitioner. Mr. Randolph then took petitioner back to his residence. (R.T. 260)

The next day, Mr. Powers picked up Mr. Randolph during the lunch hour and he purchased two additional checks. (R.T. 262) According to Mr. Randolph, about a week later, petitioner called up Mr. Randolph and told him that he had some papers for him to sign. They met and he signed the deeds of trust. (R.T. 264)

Mr. Randolph testified that he was not required by the banks to fill out any Currency Transaction Reports when he purchased the checks. Despite the fact that the "structuring" law, 31 U.S.C. § 5324, went into effect on January 27, 1987, Mr. Randolph told the jury that he

---

[10] Mr. Randolph admitted that he told Agent Fletcher that he had received $53,000 in cash on that date and when the banks were closed after he purchased four checks, he returned $17,000 to Mr. Powers and Jackson. (R.T. 336)

known that for, "a couple of years" prior to the events of this case at the time that, "[i]t was a violation" to purchase multiple checks of less than $10,000.00.[11] (R.T. 253)

Nathan Fletcher, a special agent with the Internal Revenue Service, told the jury that in the spring of 1987, he began to investigate the purchase of certain real estate in Solano County by going to the Solano County Recorder's Office. In the course of his investigation, he determined that both Mr. Powers and Mr. Jackson had purchased houses, one in Susuin City and one in Fairfield, with no money down. (R.T. 501, 502)

He next went to Founder's Title Company and learned that the down payments for the houses were in the form of cashier's checks, purchased from different banks. Suspicious that someone was structuring a currency transaction to avoid the reporting requirement, he went to the banks were the checks were purchased and determined that they were purchased with cash and that no CTR's (Currency Transaction Reports) had been

---

[11] Mr. Randolph admitted that when he spoke to Agent Fletcher on June 30, 1987, Mr. Randolph told him that he, "did not do anything wrong." (R.T. 320) He also admitted telling Agent Fletcher that he did not know it was a violation of the law to go to six different banks to avoid the bank's reporting requirement. (R.T. 328)

filed in connection with the purchase of those checks. (R.T. 503-509)

On July 29, 1987, Agent Fletcher interviewed petitioner for about one hour. (R.T. 510) Petitioner told him that his only involvement with the transactions was that: (1) he referred Powers and Jackson to Diane Langston and that he got a finder's fee for the referral and (2) he referred them to Mr. Randolph for assistance in financing. Petitioner also told him that Mr. Randolph had been pressuring him for the previous two months to refer loan customers to him. (R.T. 512) Petitioner told him that he was present when Mr. Randolph received the three thousand dollars from Mr. Jackson and Mr. Powers, but that it was his understanding that the money was for points on the loan and that the thousand dollars he received from Mr. Randolph was his referral fee. (R.T. 514)

I

Petitioner was Denied Due Process of Law and Equal Protection of the Law When the Trial Court Failed to Instruct the Jury that A Violation of 31 U.S.C. §5324, "Willfully" Structuring a Monetary Transaction Required Proof Beyond a Reasonable Doubt that Petitioner Voluntarily and Intentionally Violated a Known Legal Duty per this Court's Decision in *Cheek v. United States* (1991) __U.S.__, 111 S.Ct. 604

A.

Statement of Facts

Appellant was charged with conspiring to violate 31 U.S.C. §§5313[12] and 31 U.S.C. §5324(1) and (3)[13] as well

---

[12] Section 5313 provides, in pertinent part, that:

> "(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made."

[13] Section 5324 provides that:

as the substantive crime of structuring a monetary transaction. (31 U.S.C. §5324(3).) Section 5324 does not, by its language, create a penalty for structuring a monetary transaction; neither does §5313 for violating its reporting requirements. Criminal penalties violations of both §5313 and §5324 are determined only by reference to §5322 which provides, in pertinent part, that:

> "(a) A person *willfully* violating *this subchapter* or a regulation prescribed under this subchapter...shall be fined not more than $250,000, or imprisonment (sic) not more than five years, or both." (emphasis added)

At appellant's trial, the jury was instructed that an act is done "willfully" if it is,

> "done voluntarily and intentionally and with the specific intent to do something that the law forbids; that is to say, with

---

"No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction–

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions."

bad purpose either to disobey or disregard the law." (Instruction 12 A)

B.

This Court's Decision in *Cheek v. United States* 1991) __U.S.__, 111 S.Ct. 604 Mandates that a Jury Must be Instructed that "Willfully" as Used in 31 U.S.C. §5322 Means a "voluntary, intentional violation of a known legal duty."

Generally speaking, as used in criminal statutes, "willful" means,

> "no more than that the person charged with the duty knows what he is doing. It does not mean that in addition, he must suppose that the is breaking the law." (*American Surety Co. v. Sullivan* (2nd Cir. 1925) 7 F.2d 605, 606.)

In tax cases, however, "willful" means something more than merely doing the prohibited act intentionally; in order to convict a person of a violation of the tax laws, the prosecution must prove that the defendant committed a, "voluntary, intentional violation of a known legal duty." (*United States v. Bishop* (1973) 412 U. S. 346, 360, *Cheek v. United States, supra, United States v. Pomonio* (1976) 429 U.S. 10, *United States v. Murdock* (1933) 290 U.S. 389.)

The reasoning for this distinction was explained by this court in *Murdock, supra.*

> "Congress did not intend that a person by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should be come a criminal by his mere failure to measure up to the prescribed standard of conduct." (*Id*, 290 U.S. at 396.)

Under the statutory scheme regulating the reporting of currency transactions, the various reporting requirements are set forth in separate sections of Subchapter 2 (§§5311-5326), Chapter 53, Title 31, United States Code. The *uniform* criminal penalties for violating any one of those sections[14] are set forth in §5322. Thus the penalties for violating §5313 (domestic coins and currency transactions), §5314 (foreign financial agency transactions), §5316 (reports on exporting and importing monetary instruments) §5324 (structuring transactions to evade reporting requirements), §5325 (identification required to purchase certain monetary instruments), and §5326 (records of certain domestic coin and currency transactions) are all contained in §5322. Section 5322(a) provides criminal penalties only for, "*willfully* violating

---

[14] With the exception of §5315.

this subchapter or a regulation under the subchapter." (emphasis added)

In analyzing the mental state required for a violation of §5313 and §5316, the circuits are unanimous requiring proof of "voluntary, intentional violation of a known legal duty." (*United States v. Bank of New England* (1st Cir. 1987) 821 F.2d 844, *United States v. Eisenstein* (11th Cir. 1984) 731 F.2d 1540; *United States v. Granda* (5th Cir. 1978) 565 F.2d 922, 926; *United States v. Salinas-Garza* (5th Cir. 1986) 803 F.2d 834, 839, United *States v. Chen, supra.*) The Ninth Circuit has held that the use of the word "willfully" in §5322(a) modifies the word "violat[es]" in the currency reporting requirements of the subchapter so that,

> "the term 'willfully' in section 5322(a) makes knowledge of the reporting requirement an additional element that the government must prove in order to secure a criminal conviction." (*United States v. $122,043.00 in U.S. Currency* (9th Cir. 1986) 792 F.2d 1470, 1474, *United States v. Chen* (9th Cir. 1979) 605 F.2d 433, 434.)

Nevertheless, in August of 1990, in *United States v. Hoyland* (9th Cir. 1990) 914 F.2d 1125, the Ninth Circuit held that the same word "willfully" as used in §5322

meant something different when that *same word* in the *same statute* was applied to prosecutions under 31 U.S.C. §5324. The court held that in "structuring" prosecutions, the government need not establish that the defendant was aware that his conduct violated the law.

> "Unlike tax and section 5316 currency violations, structuring is not he kind of activity that an ordinary person would engage in innocently. Only the person who has a deliberate intention to frustrate the reporting by the banks is guilty of the offense...intent to do the act will suffice."

Following that decision, in January of 1991, *Cheek v. United States, supra*, this Court reaffirmed the special definition of "willful" in tax cases. This Court held that a defendant who believed in that "wages" were not "income" for the purposes of income tax laws could not be found guilty of a "willful" violation of the tax laws unless the government proved that the defendant was, in fact, aware that wages were considered income by law.

> "Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." (*Id.*, 111 S.Ct. at 610-611)

There can be no doubt that appellant's case is a criminal tax case. The "Declaration of Purpose" of Subchapter 2 (§5311) declares,

> "It is the purpose of this subchapter... to require certain reports or records where they have a high degree of usefulness in criminal, *tax*, or regulatory investigations or proceedings." (emphasis added)

Nevertheless, in petitioner's case, the Ninth Circuit affirmed petitioner's conviction based upon its prior decision in *Hoyland, supra.*

Given that the circuits have uniformly interpreted "willfully" as used §5322(a), to require proof of a "voluntary, intentional violation of a known legal duty" when that word is applied to §§5313 and 5316, the question then becomes, does "willfully," mean something different depending on whether the defendant is charged with "*willfully* violating" §5313 or with "*willfully* violating" §5324, both of which are in the same subchapter? While it requires no citation of authority to assert that the word "willfully" can mean different things when used in *different* contexts, when used not only in the *same* context - a criminal tax prosecution- but in the same subchapter, in the absence of evidence of specific

legislative intent to ascribe more than one meaning to that word, "willfully" means, "a voluntary, intentional violation of a known legal duty." (*United States v. Bishop, supra.*)

In *Bishop*, a criminal tax prosecution, this Court was confronted with a similar contention that the word "willfully" meant two different things, depending on whether the violation charged was a felony or a misdemeanor. This Court summarily rejected that proposition that the word "willfully" could have two different meanings in criminal tax prosecutions. This Court held that it:

> "has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty.
>
> *****
>
> "This longstanding interpretation of the purpose of the recurring word 'willfully' promotes coherence in the group of tax crimes. In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law....The Court's consistent interpretation of the word 'willful' to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." (*Id.* 412 U.S. at 359-361.)

Moreover, in *Bishop*, this Court held that the fact that a statute such as §5324 provides a separate *mens rea* element, in addition to "willfulness" requirement in the penalty section, indicates that the requirement of willfulness is separate and distinct from the other elements of the *mens rea* of the crime.

> "[t]he actor's mental state is described both by the requirement that acts be done 'willfully' and by the designation of certain express elements of the offenses....Although the described states of mind might be included in the normal meaning of the word, "willfully," the presence of both an express designation and the simultaneous requirement that a violation be committed 'willfully' is strong evidence that Congress used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula." (*Id.* 412 U.S. at 359, 360.)

It is a settled maxim of statutory construction that, "where the same terms are used in different sections of a statute, they receive the same meaning." (*Firestone v. Howerton* (9th Cir. 1982) 671 F.2d 317, 320, fn. 6; *S&M Investment v. Tahoe Regional Planning Agency* (9th Cir. 1990) 911 F.2d 324, 328)

If the same terms used *more than once* in the same statute have the same meaning, it follows, *ipso facto*,

where the same term is used *only once* in a statute prescribing penalties for other portions of the same subchapter, not only maxims of statutory construction but logic requires that that solitary word must have the same meaning wherever it is used.

There is no basis for concluding that Congress intended that the word "willfully," used in *single* penalty section, to mean two different things, depending on the currency violation to which it was applied.

> "While courts are no longer confined to the language [of the statute], they still are confined by it. Violence must not be done to the words chosen by the legislature." (Frankfurter, J., *Some Reflections on the Reading of Statutes*, 47 Co. L. Rev. 527, 543.)

Moreover, the Ninth Circuit's interpretation of §5322, 5324 would render portions of those statutes as surplusage. Without reference to the "willful" language of §5322, §5324, by its *own* words, *independently* prohibits structuring of monetary transactions, "for the purpose of evading the reporting requirements of section 5313(a)." In *Hoyland, supra*, the Ninth Circuit interpreted "willfully" in §5322, to mean the same thing, namely, "the intent to prevent reporting." If the Ninth Circuit was correct, then the word "willfully," as it appears in §5322, would be mere

surplusage, because, "the intent to prevent reporting" is already an element of §5324. Under the *Hoyland* court's interpretation, §5324, as read in the light of §5322, would read,

> "No person shall [structure a monetary transaction] for the purpose of evading the reporting requirements of section 5313(a)...A person...violating this subchapter [with the intent to evade the reporting requirement]... shall be fined not more than $250,000, or imprisonment (sic) no more than five years, or both."

Not only is this construction redundant, it reduces the "willfully" requirement of §5322 to mere surplusage. Statutes are presumed not to contain surplusage and are interpreted to avoid so rendering the words used therein. "Congress is not to be presumed to have used words for no purpose." (*Platt v. Union Pacific R.R.* (1878) 99 U.S. 48, 58; *Pacific Gas and Electric v. Securities and Exchange Commission* (9th Cir. 1942) 127 F.2d 378, 382, "[A] legislative body is presumed to have used no superfluous words in a statute...and the rule [is] that 'effect shall be given to every clause and part of a statute' (*Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208)."

Similarly, in a structuring prosecution, the fact that Congress required that the act performed be done with, "the purpose of evading the reporting requirements of §5313(a)" and that the requirement that the act be done "willfully" means something in addition to intent to evade the reporting requirement and is, "strong evidence that Congress used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula." (*Ibid.*)

This country has historically protected individual privacy from government intrusion. If a municipality passed an ordinance requiring a permit for constructing a fence six feet or higher, a person seeking to avoid the inconvenience and hassle of getting a permit by building a fence that is 5'10" high would not ordinarily be considered a criminal for "structuring" his fence to avoid the permit requirement. There is nothing *per se* illegal about cash transactions and it does not follow, *ipso facto*, that a cash transaction with tax consequences will necessarily not be reported. Arranging cash transactions to avoid a report to the government would strike most people as acceptable or, at least, non-criminal conduct.

It is anomalous indeed to require proof that a defendant knew of a reporting requirement to sustain a

criminal conviction under §5313, but to dispense with that requirement when the charge is engaging in currency transactions that do not, on their face, trigger the reporting requirement.

Law abiding citizens often structure their affairs to avoid government paperwork. Corporations are constantly structuring their financial affairs to minimize their exposure to tax liability. Inter vivos trusts are created, minors become majority stockholders in large corporations, headquarters are moved to remote locations with more favorable tax laws -- an infinite variety of legal fictions have been created to fit the letter of the tax code to minimize taxes. It is a staple of tax law that the same property can be taxed at widely varying rates, depending on how the title, domicile and, corporate character of the entity are structured.

Although it is assumed that the currency laws in question were designed with the purpose of detecting criminal activity, that does not justify abandoning a uniform construction of the word "willful." *Bishop, supra.* Especially in our complicated tax laws, it is altogether reasonable to assume that that which is not expressly prohibited is permitted. Thus mere knowledge that

reporting transactions over $10,000.00 is required in no way gives the average citizen knowledge or notice that arranging ones' financial affairs to avoid that reporting requirement is also prohibited. This was especially true in this case, where the structuring statute went into effect a few weeks before the transactions occurred.

Finally, this Court's decision in *Cheek* was both sweeping and plenary. This Court stated in no uncertain terms that:

> "Willfulness, as construed by our prior decisions *in criminal tax cases*, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." (*Id.*, 111 S.Ct. at 610) (emphasis added)

There is nothing in the Court's opinion to indicate that the holding applied to some, but not all, "criminal tax cases."[15] Indeed, when read with this Court's prior decision in *Bishop, supra*, the conclusion is inescapable that in the criminal tax laws of this country, there is only one meaning to the word willfully - "a voluntary, intentional violation of a known legal duty."

---

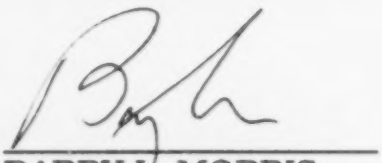
[15] Indeed, Justice Scalia, in his concurrence, indicated strongly that the opinion did not go far enough and would have allowed a criminal tax defendant to argue good faith belief in the unconstitutionality of the tax laws as a defense.

C.

Conclusion

The Ninth Circuit erred in refusing to apply this Court's decision in *Cheek, supra*, to the structuring law under which petitioner was convicted. Petitioner's conviction should be reversed and remanded for a new trial.

Dated: November 12, 1992



BARRY J. MORRIS
Attorney for Petitioner
RAY CARLISLE

PROOF OF SERVICE BY MAIL

Petition for Certiorari

I, Barry L. Morris, declare that I am a citizen of the United States of America, over the age of 18 years; my business address and place of business is 1401 Lakeside Dr. Oakland, California, 94612; and I am not a party to the within action. On the date shown below, I deposited a true copy of the above-entitled document(s) in the mail in the City of Oakland by placing said document(s) in a sealed envelope with postage thereon fully prepaid and addressed as follows:

Eric Swenson, Esq.
Assistant United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102

Clerk, Criminal Division
United States District Court
450 Golden Gate Avenue
San Francisco, California 94102

United States Court of Appeals
Ninth Circuit
P.O. Box 547
San Francisco, California 94101-0547

Solicitor General
Department of Justice
10th St. and Constitution Ave., N.W.
Washington, D.C. 20530

Executed on December 10, 1992 at Oakland, California

I declare under penalty of perjury that the foregoing is true and correct.

92-1139

No._____

(2)

Supreme Court, U.S.
FILED
NOV 20 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RAY CARLISLE, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE NINTH CIRCUIT

Appendix

Barry L. Morris
Attorney at Law
1401 Lakeside Drive, Suite 700
Oakland, California 94612
(510) 839-1288

Attorney for Petitioner
RAY CARLISLE

1 pp

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

RAY CARLISLE,

Defendant-Appellant./

No. 90-1-582

D.C. No.
CR-90-00193 TEH

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, Chief Judge, Presiding

Submitted March 25, 1992**
Filed June 22, 1992

Before: KILKENNY, GOODWIN, and FERGUSON, Circuit Judges.

Appellant Ray Carlisle appeals his conviction for violation of certain currency transaction reporting laws. We have jurisdiction of this timely appeal pursuant to 28 U.S.C. § 1291 and we affirm.

---

* This disposition is not appropriate for publicaton and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3

** The members of the panel unanimously agree that this case is appropriate for submission on the briefs and record per Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

BACKGROUND

Appellant and two co-defendants were involved in a scheme whereby cashier's checks of less than $10,000 were purchased and used to make down payments on two homes. After a jury trial, all three were found guilty of (1) conspiracy to defraud the Internal Revenue Service (IRS) by obstructing its function of investigating currency transactions over $10,000; (2) conspiracy to cause domestic financial institutions to fail to file currency transaction reports, in violation of 31 U.S.C. § 5324(1); (3) conspiracy to structure currency transactions in violation of 31 U.S.C. § 5324(3); and (4) structuring and assisting in the structuring of currency transactions in violation of 31 U.S.C. §5324(3). Appellant was sentenced to one year in custody in a halfway house, five years probation and was fined $3,500.

DISCUSSION

A. Failure to Excuse Jurors for Cause.

Carlisle claims that the trial court erred when it refused to excuse for cause two jurors who worked for the Internal Revenue Service. We review the trial court's decision whether to excuse a juror for cause for abuse of

discretion. *United States v. Claiborne*, 765 F.2d 784, 800 (9th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986).

Carlisle received two extra peremptory challenges, giving defendants a total of twelve peremptory challenges. During voir dire, prospective jurors Coviello and Lundberg indicated that they were employed by the IRS but that this would not impair their ability to impartially weigh the evidence. The court denied a defense motion to excuse them for cause. They were later excused on a peremptory challenge.

A court must excuse prospective jurors if voir dire reveals actual bias. *United States v. Daly*, 716 F.2d 1499, 1507 (9th Cir. 1983), *cert. dismissed*, 465 U.S. 1075 (1984). Bias is presumed only in extreme or extraordinary cases. *United States v. Plache*, 913 F.2d 1375, 1378 (9th Cir. 1990). Employment status, by itself, does not warrant a finding of implied bias. *Id.*; see also *United States v. Allsup*, 566 F.2d 68, 71-72 (9th Cir. 1977). Here, the district court reasonably concluded that the two jurors were competent. *Cf. Plache*, 913 F.2d at 1378.

Carlisle suggests that the district court's refusal to excuse the two jurors for cause abridged his rights to

exercise his peremptory challenges, presumably by forcing him to exhaust these challenges. He argues that the government has the burden of proving that he was not so prejudiced. Here, there was no inhibition of the right to make peremptory challenges because the district court's refusal to excuse the two jurors for cause was not error. See *Allsup*, 566 F.2d at 71. We therefore do not reach the issue of prejudice.

B. Jury Instructions.

Carlisle contends that the court erred by failing to instruct the jury that a "willful" violation of 31 U.S.C. 5 5324(3) means "a voluntary, intentional violation of a known legal duty." Because Carlisle failed to object to the instruction given, we review for plain error. *United States v. Kessi*, 868 F.2d 1097,1102 (9th Cir. 1989).

Carlisle acknowledges that our decision in *United States v. Hoyland*, 914 F.2d 1125 (9th Cir. 1990) is squarely against him. There we held that in prosecutions for structuring currency transactions the "willfulness" requirement does not necessitate proof that the defendant knew that the act of structuring currency transactions was illegal, but only that the defendant intended to evade

the reporting requirements. *Id.* at 1129. He nevertheless asks the court to reexamine its decision in light of the relevant statutory scheme and a subsequent Supreme Court case.

31 U.S.C. 5 5322 sets out the criminal penalties for willful violations of 31 U.S.C. §§ 5311 *et seq.*, which includes §5324(a). Defendant points to other crimes covered by § 5322 that do require knowledge of illegality. He argues that principles of statutory construction require that "willful" be given the same meaning when used in a single penalty section. This ground was already covered in *Hoyland*. In *Hoyland*, mindful that other subsections covered by the penalty provisions of. § 5322, i.e., § 5316, required an intent to break the law, we nevertheless found congressional intent clear. "Congress changed the law to make it a crime so to structure with the intent to prevent reporting. To act willfully under the statute is to act with this intent." Id. at 1129. *Accord United States v. Roqers*, 1992 WL 81902 (4th Cir. 1992); *United States v. Brown*, 954 F.2d 1563, 1568-69 (11th Cir. 1992); *United States v. Dashney*, 937 F.2d 532, 537-

539 (10th Cir.), *cert. denied*, 112 S.Ct. 402 (1991); *United States v. Scanio*, 900 F.2d 485, 489-91 (2nd Cir. 1990).

Carlisle's argument that *Cheek v. United States*, 111 S.Ct. 604 (1991) changes the outcome is also meritless. Cheek concerns willfulness in the context of certain criminal violations of the Tax Code. Due to the complexity of the Tax Code, "willfulness" for certain criminal tax offenses requires a voluntary and intentional violation of a known legal duty. *Id.* at 609-10. Carlisle's conviction concerns violation of currency transaction structuring laws, which are much more straightforward. See *Dashney*, 937 F.2d at 540. Carlisle has not shown why a violation of a currency structuring transaction law should be included in the narrow class of criminal tax offenses described in *Cheek*. Thus, we reject Carlisle's contention that the Cheek exception applies to the anti-structuring laws. *Accord United States v. Rogers*, 1992 WL 81902 (4th Cir. 1992); *United States v. Brown*, 954 F.2d at 1569 n.2; *United States v. Dashney*, 937 F.2d at 540; see also *United States v. Donovan*, 1992 WL 18217 (1st Cir. 1922).

Carlisle also argues that the court should have instructed the jury that they must determine that Carlisle personally knew that a currency reporting requirement existed. Upon review, we find the jury instructions were sufficient, and there was no plain error.

AFFIRMED.

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA — No. 90-10582

Plaintiff-Appellee, — D.C. No. CR-90-00193 TEH

v.

RAY CARLISLE,

Defendant-Appellant./

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, Chief Judge, Presiding

Before: KILKENNY, GOODWIN, and FERGUSON, Circuit Judges.

Filed: August 27, 1992

ORDER DENYING PETITION FOR REHEARING

The Petition for Rehearing is denied.

Supreme Court, U.S.
FILED
MAR 26 1993
OFFICE OF THE CLERK

No. 92-1139

In the Supreme Court of the United States

OCTOBER TERM, 1992

RAY CARLISLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court committed plain error by failing to instruct the jury that in a prosecution for structuring currency transactions for the purpose of avoiding currency reporting requirements in violation of 31 U.S.C. 5324, the government must prove that the defendant knew that structuring for that purpose is illegal.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Cheek v. *United States*, 498 U.S. 192 (1991)	4
United States v. *Angiulo*, 897 F.2d 1169 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990)	7
United States v. *Beaumont*, 972 F.2d 91 (5th Cir. 1992)	6
United States v. *Frady*, 456 U.S. 152 (1982)	6
United States v. *Hoyland*, 914 F.2d 1125 (9th Cir. 1990)	5
United States v. *Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989)	7
United States v. *Young*, 470 U.S. 1 (1985)	6

Statutes and regulations:

Annuzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, Tit. XV, § 1525, 106 Stat. 4064 (to be codified at 31 U.S.C. 5324(a)(3))	3
18 U.S.C. 371	2
31 U.S.C. 5322(a)	3, 5
31 U.S.C. 5324	3
31 U.S.C. 5324(a)(3)	3
31 U.S.C. 5324(3)	2, 3, 4, 5
31 C.F.R. 103.22(a)(1)	3
Fed. R. Crim. P. 52(b)	6

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1139

RAY CARLISLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is unpublished, but the judgment is noted at 967 F.2d 592 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1992. A petition for rehearing was denied on August 27, 1992. Pet. App. 8. The petition for a writ of certiorari was filed on November 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of conspiring to defraud the Internal Revenue Service by obstructing its function of investigating currency transactions in amounts over $10,000, to cause domestic financial institutions to fail to file currency transaction reports, and to structure currency transactions, all in violation of 18 U.S.C. 371; and of structuring currency transactions, in violation of 31 U.S.C. 5324(3). Petitioner was sentenced to one year's custody in a halfway house, five years' probation, and a fine of $3,500. The court of appeals affirmed. Pet. App. 1-7.

1. Petitioner participated in a scheme to purchase cashier's checks in amounts of less than $10,000. The cashier's checks were used to make down payments on two houses. Pet. App. 2. Petitioner promised to pay Curtis Randolph $3,000 if he would purchase cashier's checks in amounts of less than $10,000. Gov't C.A. Br. 3-4. Petitioner told Randolph that the purchase of the cashier's checks "needed to be done this way because of the Reporting Act on cash over $10,000." *Id.* at 4, quoting Tr. 246. Randolph purchased six cashier's checks from six different banks, four in the amount of $9,000 and two in the amount of $8,500. Gov't C.A. Br. 3.

2. At trial, the district court gave the following jury instruction on the charge that petitioner had structured currency transactions in violation of 31 U.S.C. 5324(3):[1]

---

[1] Section 5324(3) of Title 31 provides in pertinent part:

> First, that a defendant knowingly and willfully structured or assisted in structuring a currency transaction.
>
> Second, that the purpose of the transaction was to evade the reporting requirements of Section 5313(a) of Title 31.
>
> Third, that the transaction involved one or more domestic financial institutions.

Gov't C.A. Br. 9, quoting Tr. 704. The court added:

> In other words, if you find beyond a reasonable doubt that a defendant knowingly and willfully structured or assisted in structuring a currency

---

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> • • • • •
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By regulation, the Secretary has required banks to file currency transaction reports (CTRs) for any "transaction in currency of more than $10,000." 31 C.F.R. 103.22(a)(1). Under 31 U.S.C. 5322(a), any person who "willfully violat[es]" Section 5324(3), or any regulation prescribed thereunder, is guilty of a criminal offense.

On October 28, 1992, Congress amended 31 U.S.C. 5324. See Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, Tit. XV, § 1525, 106 Stat. 4064. What was formerly 31 U.S.C. 5324(3) was unaffected in substance, but that provision will be recodified as 31 U.S.C. 5324(a)(3). For purposes of simplicity, we refer to the version in effect when the court of appeals issued its decision.

> transaction with one or more domestic financial institutions and that he did so for the purpose of evading the reporting requirements of Section 5313(a), then you should find the defendant not guilty.

Gov't C.A. Br. 10, quoting Tr. 704. Similarly, the court instructed the jury as to the conspiracy charge:

> It would * * * be a violation of law for a person to willfully and knowingly conspire with one or more other persons to structure or assist in the structuring of any transaction with one or more domestic financial institutions for the purpose of evading the CTR reporting requirement.

Gov't C.A. Br. 9, quoting Tr. 700. At petitioner's request, the court gave the following instruction on willfulness:

> An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids. That is to say, with bad purpose either to disobey or to disregard the law. To constitute the crime charged in the indictment there must be a joint operation of two essential elements, an act forbidden by law and an intent to do the act.

Gov't C.A. Br. 8, quoting Tr. 690.

3. The court of appeals affirmed. Pet. App. 1-7. It rejected petitioner's contention that this Court's decision in *Cheek* v. *United States*, 498 U.S. 192 (1991), required the district court to instruct the jury that "willful" in the context of 31 U.S.C. 5324(3) means "a voluntary, intentional violation of a known legal duty." Pet. App. 4-7. Because petitioner failed

to raise that issue before the district court, the court of appeals applied the plain error standard of review. *Id.* at 4. The court found that the instructions correctly stated the law. Relying on its prior decision in *United States* v. *Hoyland*, 914 F.2d 1125, 1129 (9th Cir. 1990), the court explained that "Congress changed the law to make it a crime so to structure with the intent to prevent reporting. To act willfully under the statute is to act with this intent." Pet. App. 5. The court distinguished *Cheek* as a case arising under the Internal Revenue Code. It explained that, in light of the complexity of the tax laws, the Court held in *Cheek* that " 'willfulness" for certain criminal tax offenses requires a "voluntary and intentional violation of a known legal duty." *Id.* at 6, citing *Cheek*, 498 U.S. at 196.[2]

DISCUSSION

Petitioner contends that the district court committed plain error by failing to instruct the jury that in order to prove a "willful[] violat[ion]" (31 U.S.C. 5322(a)) of the anti-structuring provisions of 31 U.S.C. 5324(3), the government must establish that the defendant knew that it was unlawful to structure currency transactions for the purpose of avoiding federal reporting requirements. We believe that the court of appeals properly rejected petitioners' contention. But there is a conflict among the circuits on the underlying question presented, and the govern-

---

[2] The court of appeals also rejected petitioner's challenge to the district court's failure to excuse certain jurors for cause. Pet. App. 2-4. Petitioner does not pursue that argument in this Court.

ment recently acquiesced in a petition for certiorari presenting that question. See *Ratzlaf* v. *United States*, No. 92-1196. Accordingly, the Court may wish to hold the petition in this case pending its disposition of the petition in *Ratzlaf*.[3]

We note that this case differs from *Ratzlaf* in one important respect. Petitioner, unlike the petitioner in *Ratzlaf*, failed to object to the jury instructions in the district court. See Pet. App. 4. Accordingly, the jury instructions are subject to review only for plain error. See Fed. R. Crim. P. 52(b). The plain error rule may be invoked only "to correct only 'particularly egregious errors,' those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citations omitted). See also *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982) (plain error rule "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result"); *United States* v. *Beaumont*, 972 F.2d 91, 93-95 5th Cir. (1992) (not plain error to fail to instruct jury that government was required to prove that the defendant knew that structuring transactions for the purpose of evading currency reporting requirements is illegal).

Indeed, petitioner not only failed to object to the jury instructions in the district court, he specifically requested the instruction on willfulness that he now attacks. See Gov't C.A. Br. 8, quoting Tr. 690. Absent the most exceptional circumstances, a defendant cannot win reversal based on a trial error that he

---

[3] We have provided a copy of our brief in *Ratzlaf* to counsel for petitioner.

invited. See, *e.g.*, *United States* v. *Angiulo*, 897 F.2d 1169, 1216 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990); *United States* v. *Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989). Consequently, even if the Court were to grant the petition for a writ of certiorari in *Ratzlaf* and reverse the judgment of the court of appeals in that case, we doubt that petitioner would be entitled to any relief. Nonetheless, the plain error question may be affected by this Court's disposition of the *Ratzlaf* case. We therefore do not oppose the Court's holding this case pending the Court's decision whether to grant review in *Ratzlaf* and the ultimate disposition of that case.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Ratzlaf* v. *United States*, No. 92-1196, and then disposed of in light of the decision in that case.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

MARCH 1993